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NOTES

JUDICIAL REVIEW AS *MIDCAL* ACTIVE SUPERVISION: IMMUNIZING PRIVATE PARTIES FROM ANTITRUST LIABILITY

INTRODUCTION

The *Parker v. Brown*¹ state action doctrine² may immunize³ a private party⁴ from liability under federal antitrust laws.⁵ Private conduct is immune, however, only when it satisfies the two-pronged test developed in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*⁶ The challenged conduct must be pursuant to a "clearly articulated and affirmatively expressed" state policy, and it must be "actively supervised" by

1. 317 U.S. 341 (1943) (immunizing actions of a raisin cartel from liability under the Sherman Act, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1-7 (1982 & Supp. IV 1986))).

2. The *Parker* state action doctrine provides that the Sherman Act was not intended to restrain state action or official action directed by a state. See 1 P. Areeda & D. Turner, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 212a, at 68 (1978); *infra* notes 17-18 and accompanying text.

For the first fifty-three years after the enactment of the Sherman Act in 1890, litigants and courts virtually ignored the potential conflict between the antitrust laws and the anticompetitive actions of state actors. See Wiley, *A Capture Theory of Antitrust Federalism*, 99 Harv. L. Rev. 713, 714 (1986). In 1943, the Court created the state action immunity doctrine in *Parker v. Brown*, 317 U.S. 341 (1943). However, it was not until *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), that the *Parker* doctrine became controversial. Most of its substantive development has taken place in cases decided after 1975. See *infra* note 25 and accompanying text.

3. The state action doctrine is not a true "exemption" or "immunity" from the federal antitrust laws; rather, it identifies conduct not subject to those laws. The terms exemption and immunity are used for the sake of convenience. See *Fuchs v. Rural Elec. Convenience Coop.*, 1988-2 Trade Cas. (CCH) ¶ 68,247, at 59,537 n.1 (7th Cir. 1988); see also *infra* note 19.

4. The scope of this Note is limited to the *Parker* doctrine's application to private parties. While *Parker v. Brown* only immunized the actions of the state itself, the Court subsequently recognized that state action immunity could also apply in a suit against a private party. See *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 56-57 (1985).

Parker v. Brown was "premised on the assumption that Congress, in enacting the Sherman Act, did not intend to compromise the States' ability to regulate their domestic commerce." *Id.* at 56. Regulating commerce in today's complex economy necessitates some delegation of state authority to private actors. If *Parker* immunity were limited to the actions of public officials, this assumed congressional purpose would be frustrated, for a state would be unable to use delegation to implement needed regulatory programs. See *id.* at 56.

For a discussion of the private/non-private bifurcation in the *Parker* doctrine case law, see *infra* note 40.

5. Courts have generally assumed that the *Parker* doctrine applies to other federal antitrust laws in addition to the Sherman Act. See Note, *Parker v. Brown Revisited: The State Action Doctrine after Goldfarb, Cantor, and Bates*, 77 Colum. L. Rev. 898, 898 n.4 (1977).

6. 445 U.S. 97 (1980); see *infra* notes 43-47 and accompanying text.

the State itself."⁷ State agency review of private anticompetitive conduct typically satisfies the second—"active supervision"—prong of the *Midcal* test.⁸ This Note examines an issue specifically left open by the Supreme Court:⁹ whether judicial review by state courts should likewise satisfy the active supervision requirement.

Part I of this Note examines *Parker v. Brown*'s foundations¹⁰ and discusses the conflicting policy views concerning what the *Parker* doctrine should be used to accomplish.¹¹ Part II describes how recent applications of the *Midcal* test indicate a return to the deferential view of *Parker* immunity,¹² and analyzes the constitutional and economic effects of a rigorous application of the *Midcal* requirements.¹³

Part III of this Note examines whether judicial review, as opposed to agency review, satisfies the requirements of active state supervision.¹⁴ This Note argues that state court supervision of state policy may be as "active" as is necessary for state action immunity,¹⁵ and concludes that the better approach would allow judicial review as active supervision to

7. *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980) (citing *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 410 (1978)).

8. See, e.g., *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 62 (1985). Review by a state supreme court acting in a legislative capacity, and review by the executive branch, should also satisfy the *Midcal* active supervision requirement. See Jorde, *Antitrust and the New State Action Doctrine: A Return to Deferential Economic Federalism*, 75 Calif. L. Rev. 227, 240 (1987); Lopatka, *The State of "State Action Antitrust Immunity: A Progress Report*, 46 La. L. Rev. 941, 1038 (1986).

9. See *Patrick v. Burget*, 108 S. Ct. 1658, 1664-65 (1988). Only a few months later the 11th Circuit concluded that judicial review may constitute active state supervision for purposes of state action immunity. See *Bolt v. Halifax Hosp. Medical Center*, 851 F.2d 1273, 1282 (11th Cir.), *vacated*, 861 F.2d 1233 (1988) (en banc).

10. The language in *Parker v. Brown* accepts federalism as the basis of the state action immunity:

We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.

The Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state. *Parker v. Brown*, 317 U.S. 341, 350-51 (1943); see *infra* note 21.

11. The critical analyses of the *Parker* doctrine can roughly be grouped into two views—the revisionist and the deferential—depending on each author's view of what the federal antitrust laws should be used to accomplish. See *infra* notes 30-42 and accompanying text.

12. See *infra* note 43 and accompanying text.

13. See *infra* notes 48-75 and accompanying text.

14. See *infra* notes 76-100 and accompanying text. *Bolt v. Halifax Hosp. Medical Center*, 851 F.2d 1273 (11th Cir.), *vacated*, 861 F.2d 1233 (1988) (en banc), concluded that there is no principled basis for distinguishing judicial review from agency review. See *id.* at 1282.

15. See *infra* notes 101-115 and accompanying text.

immunize private parties from antitrust liability.¹⁶

I. THE PARKER STATE ACTION IMMUNITY DOCTRINE

A. Foundations

The *Parker* doctrine was conceived to protect state action from federal antitrust liability.¹⁷ The Court in *Parker v. Brown* found that the Sherman Act was intended to suppress the "business combinations" of private individuals, and not "to restrain a state or its officers or agents from activities directed by its legislature."¹⁸

There are, however, two opposing views on why the *Parker* immunity¹⁹ doctrine was originally conceived.²⁰ One view is that *Parker v.*

16. Although this Note focuses, at times, on the peer review context developed in two recent cases, *Bolt v. Halifax Hosp. Medical Center*, 851 F.2d 1273 (11th Cir.), *vacated*, 861 F.2d 1233 (1988) (en banc), and *Patrick v. Burget*, 800 F.2d 1498 (9th Cir. 1986), *reversed*, 108 S. Ct. 1658 (1988), its scope is not intended to be thereby limited. Judicial review could satisfy *Midcal* active supervision with respect to all private party delegates of state power.

17. See P. Areeda & D. Turner, *supra* note 2, ¶ 212a, at 68.

18. *Id.* (citing *Parker v. Brown*, 317 U.S. 341, 350-51 (1943)).

19. Inconsistent use of the terms "immunity," "exemption" and "preemption" results in a certain degree of confusion in the *Parker* doctrine case law and literature. See Handler, *Antitrust—1978*, 78 Colum. L. Rev. 1363, 1378-83 (1978).

"Immunity" is perhaps the best word to express the concept behind the *Parker* doctrine. Immunity is an internal concept; it concerns only one law. An action is immune from liability under a federal law when the law, as drafted, was not meant to apply. The state action doctrine is best labelled an immunity because Congress did not intend that the Sherman Act apply to state action.

In contrast, an "exemption" from a federal law occurs when a second federal law removes a specific act from possible liability under the first. See Smith, *Antitrust Immunity for State Action: A Functional Approach*, 31 Baylor L. Rev. 263, 285 (1979) (exemption is a concept that purports to resolve an apparent conflict between two or more enactments of a single sovereign). Congress in fact created a true exemption from antitrust liability for certain peer review activities. See Health Care Quality Improvement Act of 1986, 42 U.S.C. §§ 11101-11152 (Supp. IV 1986). The Act expressly provides that it does not change other immunities under the law, including state action "immunity." See *id.*; see also *Patrick v. Burget*, 108 S. Ct. 1658, 1665 n.8 (1988).

"Preemption" deals with the interplay between the enactments of two different sovereigns. See *id.* (quoting Handler, *supra*, at 1379). There can be no state action "immunity" unless the state statute authorizing the state conduct is not in conflict with a preemptive federal law in the first place. A court considering whether a defendant's conduct is immune under *Parker* must first ask whether or assume that the state statute is valid under the supremacy clause. See P. Areeda & H. Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and their Application* ¶ 209.2, at 92 (Supp. 1988). A state statute is preempted, for example, when it mandates a *per se* violation of the Sherman Act. When a state statute merely authorizes conduct which would be analyzed under the rule of reason, it is not preempted. Nevertheless, conduct pursuant to such a statute may be an antitrust violation if it does not satisfy the *Midcal* requirements. See *id.* ¶ 209.1, at 84-85.

Courts applying the *Parker* doctrine to the actions of private parties usually do not speak in preemption terms, having taken the validity of the governing statute for granted. In contrast, courts talk in more explicit preemption terms when the statute itself is challenged. See *id.* ¶ 209.2, at 94 (citing *Fisher v. City of Berkeley*, 475 U.S. 260 (1986) and *Rice v. Norman Williams Co.*, 458 U.S. 654 (1982)).

Brown was fundamentally motivated by a concern for federalism²¹—a notion of deference to state sovereigns in the absence of clear congressional intent to the contrary.²² The other view is that *Parker v. Brown* is

20. For purposes of this Note, the critical analyses of the *Parker* doctrine's foundations are grouped into two views. Support for this distinction on the basis of the *Parker* doctrine's foundations is abundant. See Wiley, *The Berkeley Rent Control Case: Treating Victims as Villains*, 1986 Sup. Ct. Rev. 157, 166-68 (1986) (controversy surrounding state action immunity is the result of its uncertain foundation within the competing interests of federalism); see also *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 605 (1976) (Blackmun, J., concurring) (unclear whether Congress intended the reach of the Sherman Act to expand along with that of the commerce power); 1 P. Areeda & D. Turner, *supra* note 2, ¶ 212a, at 67-69 (*Parker* was decided on the basis of federalism as well as Sherman Act language and legislative history); L. A. Sullivan, *Handbook of the Law of Antitrust* 734 (1977) (*Parker* was decided in a particular legislative context); Posner, *The Proper Relationship Between State Regulation and the Federal Antitrust Laws*, 49 N.Y.U. L. Rev. 693 (1974) (*Parker* stated that the Sherman Act may be supplanted by states in implementing governmental policies); Smith, *supra* note 19, at 289 (*Parker* is rooted in a particular legislative context and does not generally exempt state sanctioned activities).

Critics suggest that it is the extreme generality of the Sherman Act that invites judicial analyses producing so much uncertainty in antitrust decisionmaking. See Kissam, *Antitrust and Hospital Privileges: Testing the Conventional Wisdom*, 70 Calif. L. Rev. 595, 685 (1982).

The half-century gap between the enactment of the Sherman Act and the development of the *Parker* immunity doctrine accentuates the uncertainty. The 1890 Congress that enacted the Sherman Act held a narrow view of the commerce clause. It assumed that states could enact laws affecting actions wholly within the borders of a single state without federal intervention. Since the Sherman Act's applicability has grown with the commerce power, the problem in today's application of the *Parker* doctrine postdates the statute. See Easterbrook, *Antitrust and the Economics of Federalism*, 26 J. Law & Econ. 23, 40-41 (1983). That is to say, the unequivocal words of *Parker v. Brown*, by force of changing economic policy, appear to have lost some of their clarity. See *id.*

21. Federalism denotes a concept of the proper relationships between the states and the federal government. See G. Gunther, *Constitutional Law* 70 (11th ed. 1985) (federalism is the division of powers achieved by specifying, in the Constitution, those powers Congress might exercise, and by emphasizing that undelegated powers are reserved to the states).

Although the *Parker* doctrine is clearly based on federalism, it is the degree to which one would intervene on state regulations—in other words, the degree to which one considers federalism a non-interventionist doctrine—that determines how broadly one draws *Parker* immunity from federal antitrust laws. See, e.g., Wiley, *supra* note 20, at 167 (to the threat of special interest groups controlling state law, the non-interventionist school of antitrust federalism must say, "I see it, but the difficulty of the problem and the need to defer to state and local decisionmaking puts it out of bounds for antitrust.")

The *Parker* doctrine is the product of the struggle inherent in our two-tier governmental system. Federal antitrust policy seeks freely competitive markets; states have an interest in controlling local activities. *Parker* is a public policy attempt to balance the competing ideals and interests. See Casenote, *Patrick v. Burget: State Action or Private Collusion?*, 23 Willamette L. Rev. 937, 939-40 (1987).

22. See *Patrick v. Burget*, 108 S. Ct. 1658, 1662 (1988) ("Relying on principles of federalism and state sovereignty, [the *Parker*] Court refused to find in the Sherman Act 'an unexpressed purpose to nullify a state's control over its officers and agents.'") (quoting *Parker*, 317 U.S. at 351).

Under the supremacy clause of the Constitution, state/federal conflicts are resolved in favor of federal law. "Although a uniform resolution of the conflict in favor of antitrust is . . . unthinkable—and surely was not part of the structure forged by Congress in 1890—it is difficult to find in the statutes any form of 'inverse supremacy' principle under

a decision rooted in a particular legislative context—interpreting an anticompetitive state law that was consistent with a similar federal policy²³—rather than a sweeping deference to state economic regulation.²⁴

The majority of state action immunity cases have been decided since 1975.²⁵ These decisions can be mapped on a spectrum between the two views, depending on the degree to which a particular court was willing to accept the non-interventionist language in *Parker v. Brown*.²⁶ One reason for this spate of recent state action immunity decisions is *Parker*'s uncertain foundation.²⁷ This uncertainty has stimulated a deluge of critical analyses,²⁸ using the *Parker* doctrine as a platform to express views on

which state and local rules always prevail." Easterbrook, *supra* note 20, at 25; see also Kissam, *supra* note 20, at 621 n.118 (constitutional values should be employed to resolve open questions of statutory interpretation). The troubling constitutional question that lies at the heart of the *Parker* doctrine is the proper accommodation between federalism and the supremacy clause. Easterbrook, *supra* note 20, at 47.

23. *Parker* rebutted a challenge to a California statute that authorized the establishment of agricultural marketing programs restricting competition among growers and maintaining prices. See *Parker v. Brown*, 317 U.S. 341, 344 (1943). Some legal scholars believe that the Court was influenced by the fact that the state statute was consistent with a federal statute that also authorized marketing restrictions on agricultural products. See L.A. Sullivan, *supra* note 20, at 734. But see 1 P. Areeda & D. Turner, *supra* note 2, ¶ 212a, at 68 (although the California law's consistency with federal policy could in itself create an implied exemption to the antitrust laws, the *Parker* Court did not rely on that fact).

24. See L.A. Sullivan, *supra* note 20, at 734 (state action exemption is not an imperative, nor a rule to be mechanically applied, but an invitation to judge the proper relationship of state policy to antitrust laws); see also Smith, *supra* note 19, at 289 (the functional approach to the doctrine of antitrust immunity is a reflection of the judicial creation of state action immunity as an accommodation of potentially competing sovereigns).

25. Since 1975, the Supreme Court has decided twelve cases concerning state action immunity. Six of those cases found immunity: *Fisher v. City of Berkeley*, 475 U.S. 260 (1986); *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48 (1985); *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985); *Hoover v. Ronwin*, 466 U.S. 558 (1984); *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 439 U.S. 96 (1978); *Bates v. State Bar*, 433 U.S. 350 (1977).

Six have declared state action immunity inapplicable: *Patrick v. Burget*, 108 S. Ct. 1658 (1988); *Community Communications Co. v. Boulder*, 455 U.S. 40 (1982); *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980); *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978); *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976); *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975).

26. 317 U.S. 341, 350-51 (1943); see *supra* note 10.

Parker was possibly based on statements in the legislative history of the Sherman Act that affirmatively express a desire not to invade the legislative territory of the states. See, e.g., *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48 (1985); *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 632 (1976) (Stewart, J., dissenting); Garland, *supra* note 25, at 511 n.154 (1987) (citing H.R. Rep. No. 1707); Lopatka, *supra* note 8, at 952 n.48.

However, the law interpreting the Sherman Act is basically judge-made. See, e.g., Easterbrook, *supra* note 20, at 25; Smith, *supra* note 19, at 264.

27. See *supra* note 20.

28. See, e.g., Areeda, *Antitrust Immunity for "State Action" After Lafayette*, 95 Harv. L. Rev. 435 (1981); Easterbrook, *Antitrust and the Economics of Federalism*, 26 J. Law & Econ. 23 (1983); Garland, *Antitrust and State Action: Economic Efficiency and the Political Process*, 96 Yale L.J. 486 (1987); Handler, *Antitrust—1978*, 78 Colum. L. Rev. 1363

what federal antitrust laws should accomplish.²⁹

B. Policy Views

The policy views on using *Parker* immunity in antitrust regulation can be divided into two camps, here labelled the "revisionist" and the "deferential."³⁰ The revisionist view suggests a narrowing or reformulation of the state action immunity doctrine, to realign it with the corresponding economic interpretation suggested for antitrust laws in general.³¹ The

(1978); Jorde, *Antitrust and the New State Action Doctrine: A Return to Deferential Economic Federalism*, 75 Calif. L. Rev. 227 (1987); Kissam, *Antitrust and Hospital Privileges: Testing the Conventional Wisdom*, 70 Calif. L. Rev. 595 (1982); Lopatka, *The State of "State Action" Antitrust Immunity: A Progress Report*, 46 La. L. Rev. 941 (1986); Page, *Interest Groups, Antitrust, and State Regulation: Parker v. Brown in the Economic Theory of Legislation*, 1987 Duke L.J. 618 (1987); Posner, *The Proper Relationship Between State Regulation and the Federal Antitrust Laws*, 49 N.Y.U. L. Rev. 693 (1974); Sachs, *Antitrust, the States and the Professions*, 52 Antitrust L.J. 189 (1983); Smith, *Antitrust Immunity for State Action: A Functional Approach*, 31 Baylor L. Rev. 263 (1979); Verkuil, *State Action, Due Process and Antitrust: Reflections on Parker v. Brown*, 75 Colum. L. Rev. 328 (1975); Wiley, *A Capture Theory of Antitrust Federalism*, 99 Harv. L. Rev. 713 (1986); Wiley, *The Berkeley Rent Control Case: Treating Victims as Villains*, 1986 Sup. Ct. Rev. 157 (1986).

29. There is an inherent conflict between the mandate of the Sherman Act—free market competition—and the states' choice to regulate in the first place. See Casenote, *supra* note 21, at 939-40.

As Professor Jorde explains, state economic regulation usually supplants competition and free markets. States commonly regulate utilities, license professions, zone property, limit public transportation permits, or place other price or entry controls upon selected businesses. Allocative inefficiencies may result from these regulations, but these costs are offset by several perceived benefits of deferential federalism: citizen participation in local government, efficiency in government, creative experimentation by the states, and diffusion of power. Jorde, *supra* note 8, at 231-34.

30. For purposes of this discussion, the critical analyses have been grouped according to the policy each critic believes should govern the application of the *Parker* doctrine. These views do not necessarily correspond to the two views in the preceding section concerning the foundations of the doctrine. See *supra* notes 19-29 and accompanying text.

The "deferential" view holds that the federal judiciary should not interfere with a state's political decision, however misguided, to substitute regulation for the operation of the market. Garland, *supra* note 25, at 487-88; see also Page, *supra* note 28, at 621 (the Court has long recognized that due regard for state sovereignty requires that congressional intent to preempt be particularly explicit in areas traditionally regulated by the states). As Professor Areeda explains, erroneous application of state policy does not negate the underlying state authorization. Wise and efficient federalism argues against review by antitrust courts of ordinary state agency errors. Areeda, *supra* note 28, at 450, 453.

The "revisionist" view holds that state restraints, even if adequately supervised, should be subject to some level of federal review through the antitrust laws. See 1 P. Areeda & D. Turner, *supra* note 2, ¶ 215c, at 97-98; Easterbrook, *supra* note 20, at 23 n.1, 27; Posner, *supra* note 20, at 695-96; Wiley, *supra* note 20, at 714 & n.74; see also Kissam, *supra* note 20, at 684 n.443 (citing the apparent ascendancy of the economic efficiency view in actual court decisions).

31. The revisionist view, as a product of Chicago School antitrust economics, is criticized for underenforcing the existing antitrust laws. See Sachs, *Antitrust, the States and the Professions*, 52 Antitrust L.J. 189, 202 (1983) (evident in the 1980s Department of

revisionists' goal of allocative efficiency³² is essentially antithetical to language in *Parker* concerning deference³³ to anticompetitive state regulation.³⁴ The logical extension of the revisionist view is that state restraints—even those clearly articulated, affirmatively expressed, and actively supervised—should be subjected to some level of substantive review.³⁵

Justice policy to retreat from antitrust enforcement in certain areas which have traditionally been the subject of vigorous enforcement).

In the context of *Parker* state action immunity, however, the revisionist approach would seek to impose liability where the deferential view would find immunity. See Jorde *supra* note 8, at 235, 238-40.

32. Although numerous theories have been proposed under the economic efficiency banner, this Note groups them under the "revisionist" heading. These theories have in common the notion that allocative efficiency is the primary goal of federal antitrust laws. See Wiley, *supra* note 20, at 172 (that which increases efficiency should not be a violation, but that which decreases it should be struck down regardless of any so-called "immunity").

Allocative efficiency is the primary goal of the price theory model of perfect competition. See, e.g., P. Areeda, *Antitrust Analysis: Problems, Text, Cases* ¶ 107, at 5, ¶ 116, at 18-20 (3d ed. 1981); see also Hovenkamp, *Antitrust Policy After Chicago*, 84 Mich. L. Rev. 213, 226 (1985). Perfect competition is theoretically achieved when marginal cost equals marginal revenue and no competitor has the market power to raise prices. See P. Areeda, *supra*, at ¶¶ 107, 116. The term "allocative efficiency" describes the form an ideal distribution of resources would take in a market tending toward perfect competition. See *id.*

33. See *supra* note 10.

34. "Capture theory" is one example of a revisionist theory. Though not the extreme model, it is in effect a form of substantive review. Essentially, it operates on the assumption that producers have gained control of, or "captured" the political bodies regulating them. This suspicion "has inclined people to view regulation as the product and protector of producer interests." Wiley, *supra* note 2, at 714; see Easterbrook, *supra* note 20, at 23. Fundamentally, however, capture theory preempts certain state economic choices no matter how explicitly they are chosen through legislation or otherwise. See Garland, *supra* note 25, at 509; Page, *supra* note 28, at 622-25; see also Hovenkamp, *supra* note 32, at 249-55 (drawing a distinction between special interest and efficient legislation is manifestly inconsistent with the general Chicago School theory that when a market speaks—even a political market—the presumption is very strong that it should be listened to).

35. The extreme view is that state-imposed restraints, even if adequately supervised, should be subject to a traditional rule of reason analysis, and would be sustained only if their potential benefits outweighed their harms. See *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 610-11 (Blackmun, J., concurring); 1 P. Areeda & D. Turner, *supra* note 2, ¶ 215c, at 97-98 (1978).

Critics point out that allowing the federal antitrust court to determine which state-imposed restraints are justified and which are not ultimately enables that court to override the legislative judgments of the states—precisely what the *Parker* decision was intended to prevent. Moreover, such an approach lacks judicially manageable standards. See *id.*

Recently, the states themselves have shown a tendency to enforce federal and state antitrust laws more strictly. See P. Areeda & H. Hovenkamp, *supra* note 19, ¶ 208, at 79. This is perhaps the most effective way of relieving the potential tensions between the states' right to regulate and enforcement of federal antitrust policy. See Sachs, *supra* note 31, at 192-93 (states are in a better position than the federal government to require compliance with antitrust laws). Stricter state enforcement of antitrust laws circumvents the federalism tensions inherent in the *Parker* doctrine. See *id.* The tension between competition and regulation that is closest to the heart of antitrust is thereby more clearly exposed.

The revisionist view appeared to be gaining ground during the late 1970s, when *Parker* immunity was narrowly construed.³⁶ Municipalities were subject to treble damages for conduct pursuant to local ordinances unless the state itself expressed a parallel policy authorizing such municipal regulation.³⁷ It appeared as though the state had to "compel" anticompetitive conduct before such action would be considered immune.³⁸

Recently, however, the cases have returned to a more deferential approach,³⁹ at least in situations where the anticompetitive actor is clearly not a private party.⁴⁰ This deferential approach follows a trend evident

36. See, e.g., *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978); *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976); *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975); see also Wiley, *supra* note 2, at 714; Kissam, *supra* note 20, at 684 n.443.

37. See, e.g., *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978). Before the law was clarified in *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985), both prongs of the *Midcal* test were applied to municipalities. See *id.* at 46. In other words, in order for a municipality to take advantage of *Parker* immunity, it had to prove that its local regulations were authorized and supervised by the state itself.

38. In *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), the Court seemed to say that it was not enough that the bar association's activities complemented the objectives of the professional ethics codes, but that any such "anticompetitive activities must be compelled by direction of the State acting as a sovereign." *Id.* at 791 (emphasis added).

39. To find immunity for the anticompetitive actions of a municipality today, a court merely examines whether the actions were taken pursuant to a clearly articulated state policy to displace competition. See *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 39-40 (1985). The Court does not require active state supervision. See *id.*

Compulsion is no longer required under the first *Midcal* prong. See *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 60 (1985); *Hallie*, 471 U.S. at 46-47; P. Areeda & H. Hovenkamp, *supra* note 19, ¶ 212.5, at 145-50; see also Jorde, *supra* note 8, at 242-43 (by rejecting the compulsion requirement, the Court relaxed the clear articulation requirement).

40. State action immunity has recently expanded for non-private parties. See, e.g., *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 45-46 (1985) (active supervision element not required for municipalities, and probably not for other non-private actors); P. Areeda & H. Hovenkamp, *supra* note 19, ¶ 212.7, at 156 (dispensing with the active supervision element for municipalities implies, a fortiori, the same for departments and agencies of the state itself).

However, where state or municipal regulation by a private party is involved, active state supervision must be shown, even where a clearly articulated state policy exists. See *Racetrac Petroleum, Inc. v. Prince George's County*, 601 F. Supp. 892, 901-03 (D. Md. 1985); P. Areeda & H. Hovenkamp, *supra* note 19, ¶ 212.7, at 155-61. State action immunity thus appears to have narrowed for private parties. See *Patrick v. Burget*, 108 S. Ct. 1658, 1663 (1988) (decisions over the last decade have effectively narrowed the state action immunity of private parties); *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 73-74 (1985) (Stevens, J., dissenting) (the *Midcal* requirements limited the scope of state action immunity for private parties); Areeda, *supra* note 28, at 438. But see generally Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. Pa. L. Rev. 1349 (1982) (using public/private example to illustrate the decline of such legal distinctions).

With respect to the private/non-private bifurcation, the policy of the Court, requiring a stricter standard for private parties, coincides with its policy under the other antitrust immunity doctrine—*Noerr-Pennington*.

Noerr-Pennington immunity protects the efforts of private parties who petition a governmental body from the anticompetitive consequences resulting from enactment of the sought after legislation. The doctrine holds that federal courts will not (except in cases of "sham") use a defendant's initiation of governmental processes—lobbying, petitioning

in critical analyses⁴¹ that propose a return to non-interventionist federalism. The deferential view urges judicial restraint, absent more explicit congressional intent, in applying federal antitrust laws to those areas traditionally regulated by the states.⁴²

II. THE MIDCAL TEST FOR STATE ACTION IMMUNITY

A. The Midcal Test Exemplifies the Deferential View

Recent applications of the *Midcal* test⁴³ exemplify the return to a more deferential approach in using the *Parker* immunity doctrine. The first *Midcal* requirement, that state legislation be clearly articulated and af-

agencies, filing lawsuits, or the like—to expose that defendant to Sherman Act remedies that would unacceptably chill such political advocacy. See *United Mine Workers v. Pennington*, 381 U.S. 657 (1965); *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961).

This policy of applying a stricter standard for private parties is particularly evident in *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 108 S. Ct. 1931 (1988). There the Supreme Court divided over *Noerr-Pennington* application. The majority found that the “context and nature” of the activity—in this case the standard-setting process of a private association—determines the scope of *Noerr-Pennington* immunity. See *id.* at 1939.

The particular association in *Allied Tube* set standards for fire-proof building materials. These standards were summarily adopted by a majority of state legislatures. Private parties in this case succeeded in “packing” the association’s vote and thereby denying approval for a competitor’s new product. See *id.* at 1935.

Although several justices strongly argued that this action—petitioning of a quasi-legislative governmental body—fit squarely within the *Noerr-Pennington* definition of immunity, see *id.* at 1943 (White, J., dissenting), the majority did not agree. Concerned about the blatant and effective maneuverings of private parties to encourage anticompetitive regulations, no immunity was found. Cf. *id.* at 1942 (no *Noerr* immunity where an economically interested private party exercises decision-making authority).

The relevance of this case to *Parker* immunity is the Court’s parallel wariness in granting antitrust immunity to the actions of private parties under either immunity doctrine. Indeed, the language of the Court in *Allied Tube* is remarkably similar to the language used in *Parker* immunity cases; the majority actually cites to *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985), and *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), two important state action immunity cases.

41. See, e.g., *Areeda*, *supra* note 28, at 454-55; *Garland*, *supra* note 25, at 487-88; *Page*, *supra* note 28, at 622-23.

42. See *Page*, *supra* note 28, at 621 (the Court has long recognized that proper judicial restraint requires congressional preemptive intent to be particularly explicit in areas traditionally regulated by the states).

43. See *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48 (1985) (*Midcal* test used to immunize the actions of private parties—common carrier rate agencies); *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985) (*Midcal* test used to immunize a municipality); *Hoover v. Ronwin*, 466 U.S. 558, 568-69, 579-80 (1984) (when sovereign acts neither *Midcal* prong is necessary).

The two-prong test, established in *Midcal* as the *sine qua non* of state action immunity for private parties, actually can be traced back to earlier cases. In finding state action immunity for a state bar association, the Supreme Court deemed it “significant that the state policy is so clearly and affirmatively expressed and that the State’s supervision is so active.” *Bates v. State Bar*, 433 U.S. 350, 362 (1977). Indeed, even the case that created the state action immunity doctrine distinguishes mere “authorization” of anticompetitive activity from situations where the state “adopts” and “enforces” a system of regulation. See, *Parker v. Brown*, 317 U.S. 341, 352 (1943).

firmatively expressed as state policy, is the more important one.⁴⁴ To satisfy it, a state must be explicit about which activities are included in its plan of regulation.⁴⁵

The second requirement, that anticompetitive conduct pursuant to state regulation be actively supervised by the state itself, merely corroborates the first. Demonstrating active supervision⁴⁶ ensures that the state is committed to a particular regulation. As the Court noted in *Town of Hallie v. City of Eau Claire*, the active supervision requirement serves "essentially an evidentiary function: . . . one way of ensuring that the actor is engaging in the challenged conduct pursuant to state policy."⁴⁷ In sum, to satisfy the *Midcal* requirements, a state must show that it intends to displace competition in the marketplace; the supervision prong is required simply to provide evidence of such state intent.

B. *The Procedural Nature of the Midcal Test*

The *Midcal* test is a device used to distinguish anticompetitive actions in which the state is to some degree involved from the purely private actions of non-governmental actors.⁴⁸ When the *Midcal* test is correctly applied, the court looks to *whether* the state intends to displace competition and *whether* it actively supervises private anticompetitive conduct committed pursuant to state policy, rather than *how well* it has chosen to do so. This is a "procedural"⁴⁹ application of the test; it distinguishes between situations where a state intends to displace free market competition and situations where regulation is merely a "gauzy cloak of state

44. See Lopatka, *supra* note 8, at 1038-39 (supervision should not be required at all for immunity, but should merely serve as evidence of state intent).

45. This requirement "reinforces representative political processes by ensuring that the decision to displace antitrust [enforcement] is made only after competing interest groups have survived the traditional Madisonian gauntlet of legislative procedures." Page, *supra* note 28, at 619; see 1 P. Areeda & D. Turner, *supra* note 2, ¶ 214a, at 83; P. Areeda & H. Hovenkamp, *supra* note 19, ¶ 212.3, at 123-43.

46. The active supervision requirement stems from the recognition that "[w]here a private party is engaging in the anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the States." *Patrick v. Burget*, 108 S. Ct. 1658, 1663 (1988) (quoting *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 47 (1985)). This requirement "mandates that the State exercise ultimate control over the challenged anticompetitive conduct." See *Patrick*, 108 S. Ct. at 1663; see also *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 344-45 (1987) (finding a state's liquor pricing system not actively supervised by the state); 1 P. Areeda & D. Turner, *supra* note 2, ¶ 213b, at 74-75 (final control must be in the hands of independent state officials).

47. 471 U.S. 34, 46 (1985) (emphasis added); see *Fuchs v. Rural Elec. Convenience Coop.*, 1988-2 Trade Cas. (CCH) ¶ 68,247, at 59,541 (7th Cir. 1988) (citing *Hallie*).

48. See sources cited *infra* notes 50-51.

49. See *Jorde*, *supra* note 8, at 236 ("two-pronged test is process-oriented because it focuses on the mechanics that produce an anticompetitive regulation, rather than on the desirability of the regulation").

In contrast, a "substantive" application of the *Midcal* test examines the value of state regulation to determine whether it merits state action immunity. See *supra* notes 34-35 and accompanying text.

involvement"⁵⁰ cast over what is essentially private anticompetitive conduct.⁵¹

Although the *Midcal* test, on its face, provides a simple and straightforward test for state action immunity,⁵² it has resulted in judicial activism.⁵³ When courts construe the *Midcal* test too strictly—to require a high standard for either *Midcal* requirement—the procedural nature of the test tends to be subsumed in a substantive review of the underlying state regulation.⁵⁴ While a court must somehow distinguish action of the state from purely private activity cloaked in official state action garb, rigorous application of the *Midcal* test invites the court to intrude into state legislative processes.⁵⁵

A procedural application of the *Midcal* requirements avoids the dangers inherent in substantive review.⁵⁶ In addition, a finer balance is

50. *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 46-47 (1985) (quoting *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 106 (1980)).

51. *See* P. Areeda & H. Hovenkamp, *supra* note 19, ¶ 212.1, at 110-15.

52. *See* Page, *Antitrust, Federalism, and the Regulatory Process: A Reconstruction and Critique of the State Action Exemption After Midcal Aluminum*, 61 B.U.L. Rev. 1099, 1115-21 (1981); Page, *supra* note 28, at 642-44.

53. *See* Kissam, *supra* note 20, at 620-23 (*Midcal* test seems to invite judicial activism in federal antitrust laws); *see, e.g., Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978); *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976).

54. As Professor Jorde explains:

[T]he Court's willingness to apply the rigorous requirements of the process test to invalidate state attempts to delegate economic decisionmaking . . . marked a clear retreat from the principles of economic federalism underpinning *Parker*. Although not as openly defiant as the substantive review called for by *Cantor*, the rigorous process test invited courts to intrude into state legislative processes to determine whether the words of a statute or its legislative history could justify a state action exemption.

Jorde, *supra* note 8, at 237 (referring to *Cantor v. Detroit Edison*, 428 U.S. 579 (1976)).

55. *See id.*

56. The danger avoided by using a procedural test as opposed to a substantive test is the unwarranted willingness of courts to subject state regulatory policies to supervening federal antitrust policy. *See* Wiley, *supra* note 2, at 714.

One interesting theory, concerned with a substantive application of the state action doctrine, opines that "*Parker* was decided largely on the ground that the Court was unwilling to reenter the political mire of the *Lochner* [v. New York] era under the guise of Sherman Act preemption analysis." Page, *supra* note 30, at 624; *See* Verkuil, *supra* note 28, at 329; *see also* Komesar, *In Search of a General Approach to Legal Analysis: A Comparative Institutional Alternative*, 79 Mich. L. Rev. 1350, 1383-90 (1981).

In *Lochner v. New York*, 198 U.S. 45 (1905), the Court struck down, as a violation of substantive due process, a New York law limiting the hours of bakers. *See id.* at 64-65. In the early 1900s, federal courts used the *Lochner* concept of substantive due process to invalidate federal and state progressive legislation aimed at regulating economic behavior in the marketplace.

The Court's repudiation of the *Lochner* penchant came at much the same time that *Parker* announced the state action immunity doctrine. *Nebbia v. New York*, 291 U.S. 502 (1934) (sustaining a New York regulatory scheme for fixing milk prices).

Under Professor Verkuil's theory, "[a]lthough presumably disdaining of substantive economic due process, the federal courts have seized upon another approach to oversee state economic regulation, [namely the] application of the antitrust laws to the offensive conduct." Verkuil, *supra* note 28, at 329. Although this appears to be a welcome correc-

achieved between antitrust laws and federalism: a procedural application of the *Midcal* test permits the states to play an active role in regulating the economy and reduces federal court intervention into state regulatory regimes.⁵⁷

C. Efficiency Considerations in Applying *Midcal*

A strict application of the *Midcal* active supervision prong may result in legitimate state regulation being invalidated on a pretext of inadequate supervision.⁵⁸ In addition, a strict active supervision requirement forces the states to adopt the form of regulation least favorable to allocative efficiency.⁵⁹ Even when a strict supervision requirement is imposed only on delegation of state authority to private parties, it requires costly supervision and limits the methods a state may employ to implement a program of regulation.⁶⁰ A recent *Parker* immunity case,⁶¹ for example, appears to require an entire administrative agency infrastructure in order to supervise the state-mandated peer review decisions of local hospitals.⁶² Such heavily supervised regulation of state delegated powers may lead to higher costs for consumers and regulated firms.⁶³

Both the revisionist and the deferential theorists would likely agree in condemning the result of a strict application of the *Midcal* test.⁶⁴ The deferential view would oppose a strict construction of the *Midcal* require-

tive measure to runaway state regulations, it compromises the policies of federalism and judicial self-restraint. *See id.*

The theory that *Parker* followed the Court's concern in *Nebbia* (and its progeny upholding state and federal regulation) is arguably incorrect, because it concludes that the guiding tenet of the *Nebbia/Parker* Court's reconstruction was the notion that the states should be free to make their own economic decisions. *See id.* at 329 & nn.7-9. The intent behind the repudiation of *Lochner* was to allow federal laws to regulate the economic marketplace. However, a necessary corollary was to allow state regulation to exist. *See, e.g., West Coast Hotel v. Parrish*, 300 U.S. 379 (1937) (upholding a state minimum wage law for women); *Nebbia v. New York*, 291 U.S. 502 (refusing to invalidate, on substantive economic due process grounds, a state scheme to fix milk prices).

The analogy of substantive economic due process to antitrust review serves as an apt warning against substantive formulations of *Parker* state action immunity. *See Verkuil, supra* note 28, at 334-35. *See generally* Hovenkamp, *The Political Economy of Substantive Due Process*, 40 Stan. L. Rev. 379, 439-41 (1988).

57. *See Jorde, supra* note 8, at 247.

58. *See id.* at 248-49.

59. *See Easterbrook, supra* note 20, at 29 (any limits imposed by the Court on the methods of state regulation are unlikely to be beneficial); Garland, *supra* note 25, at 499.

Furthermore, inefficient regulation decreases competition among the states to attract economic activity. *See Easterbrook, supra* note 20, at 33-35 (competition is greatest if states may adopt any regulations they choose at any level of government they choose).

60. *See Jorde, supra* note 8, at 248-49.

61. *Patrick v. Burget*, 108 S. Ct. 1658 (1988).

62. It is questionable whether such a scenario would even be possible, in light of the sheer number of decisions made by peer review commissions each year. *See infra* notes 93, 95.

63. *See Easterbrook, supra* note 20, at 32-33.

64. It is unusual that the revisionist view would parallel the deferential view in condemning the same result. *See supra* note 31.

ments because this would compromise the procedural nature of the test.⁶⁵ The revisionist view would tend to accept a more lenient *Midcal* test over the alternative of the costly and inefficient requirement of heavily supervised state regulation.⁶⁶ One revisionist argument, for example, is that the best form of regulation of a natural monopoly may be competition for the right to be the monopolist.⁶⁷ Similarly, an outright immunity from antitrust laws may be much better for consumers than a requirement of heavily-supervised regulation.⁶⁸

The Supreme Court considered efficiencies in applying the *Midcal* test in *Southern Motor Carriers*.⁶⁹ The Court noted the importance of the "range of regulatory alternatives available to the State"⁷⁰ and the "manner in which the States . . . have intended their permissive policies to work,"⁷¹ implying that efficiency in state regulations is a federal concern. *Southern Motor Carriers* considered legislation in three states that expressly permitted motor carriers to submit collective rate proposals to public service commissions, which had the authority to accept, reject or modify any such recommendation. Citing their efficiency, the Court declared the collective ratemakers immune from antitrust liability.⁷² The Court noted that "[c]onstruing the Sherman Act to prohibit collective rate proposals eliminates the free choice necessary to ensure that [the policies of efficiency and competition] function in the manner intended by the States."⁷³

Although *Southern Motor Carriers* was concerned with the first *Midcal* prong and whether state "compulsion"⁷⁴ of private anticompetitive conduct was required for state action immunity, the efficiency considerations apply equally to the second *Midcal* prong. A strict active supervision requirement limits the states' ability to choose the most economically efficient regulation.⁷⁵ Thus, analysis of the purpose and function of the *Midcal* test exposes the potential problems inherent in a non-procedural application of the test. Strict interpretation of the active supervision prong, in particular, facilitates unwarranted substantive review of state regulation and may result in allocative inefficiency.

65. See *supra* notes 48-57 and accompanying text.

66. Cf. Easterbrook, *supra* note 20, at 32 (heavy supervision would lead to higher costs for consumers and firms); Wiley, *supra* note 2, at 733-39 (strict *Midcal* requirements generate inherently ineffective and costly regulation).

67. See Easterbrook, *supra* note 20, at 32-33.

68. See *id.* at 32.

69. *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 59-60 (1985).

70. *Id.* at 61.

71. *Id.* at 59.

72. See *id.* at 59-60, 63.

73. *Id.* at 59-60.

74. See *supra* note 38 and accompanying text.

75. See Jorde, *supra* note 8, at 236-40.

III. THE ACTIVE SUPERVISION REQUIREMENT

A. *Agency Review Satisfies the Active Supervision Requirement*

A state typically satisfies the *Midcal* active supervision prong by giving an administrative agency supervisory authority over private conduct.⁷⁶ Agency review qualifies as active supervision by exercising ultimate control over the challenged anticompetitive conduct.⁷⁷ This "ultimate control" criterion necessarily entails the power to review the anticompetitive conduct of private parties and the power to overturn a decision that fails to accord with state policy.⁷⁸ However, state agencies that silently approve or merely fail to object to the self-interested decisions or recommendations of private parties conceivably satisfy this "ultimate control" criterion.⁷⁹ For example, in *Southern Motor Carriers*, the Court immunized a process of collective ratemaking by private parties that received only limited supervision.⁸⁰ Rates proposed by these private parties became effective if the state agency took no action within a specified period of time.⁸¹ Therefore, active supervision appears to be satisfied as long as state agencies have the power of ultimate review, whether or not it is exercised in every instance.

The Supreme Court has specifically left open the question whether judicial review of private conduct can ever constitute active supervision for purposes of the state action doctrine.⁸² The following sections explain how judicial review fulfills the same function as agency review, and thus should logically satisfy the supervision prong of the *Midcal* test.

B. *Judicial Review Compared With Agency Review*

Administrative agencies perform their supervisory function in place of the state's judicial branch of power.⁸³ Authority to supervise is delegated

76. See, e.g., *Patrick v. Burget*, 108 S. Ct. 1658, 1664 (1988); *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 62 (1985).

77. See *Patrick*, 108 S. Ct. at 1663; *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 345 n.7 (1987); see also *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 46 n.10 (1985).

78. See *Patrick*, 108 S. Ct. at 1664; *Hallie*, 471 U.S. at 46; *Bolt v. Halifax Hosp. Medical Center*, 851 F.2d 1273, 1281 (11th Cir.), *vacated*, 861 F.2d 1233 (1988) (en banc).

79. It appears that active supervision does not require a state agency to actually hold a hearing, or take evidence, or even write a decision in every case. See *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 50-51, 64-65 (1985) (finding immunity even where a proposed rate became effective if a state agency took no action within a specific period of time); 1 P. Areeda & D. Turner, *supra* note 2, ¶ 213c, at 75 (1978) ("[A]n allegation that state officials customarily 'rubber stamp' the self-interested decisions or recommendations of the private parties involved should not ordinarily oust *Parker* immunity.").

80. See *Southern Motor Carriers*, 471 U.S. at 62 (government conceded that the state actively supervised the collective ratemaking associations through a state agency).

81. See *id.* at 50-51.

82. See *Patrick v. Burget*, 108 S. Ct. 1658, 1664-65 (1988).

83. See generally K.C. Davis, *Administrative Law* 1-14 (3d ed. 1972) (tracing the development, implications and policy considerations of administrative law).

to an agency, rather than left in state courts, for one fundamental reason—necessity.⁸⁴ Supervision by administrative agencies is necessary to prevent an overwhelming burden on the courts.⁸⁵

In performing their respective functions, courts and agencies provide essentially the same level of supervision.⁸⁶ An examination of three factors—convenience, competence and judicial economy—illustrates that there is no principled basis for distinguishing the quality of supervision provided by agencies from that provided by courts.⁸⁷

First, it is argued that since a dispute often grows directly out of the administrative handling of a particular situation, the particular agency concerned can most conveniently conduct the proceeding.⁸⁸ The *Midcal* supervision requirement, however, focuses on the quality of the state's decision—whether certain anticompetitive conduct accords with state policy—rather than on the mechanics of the decision itself. While administrative agencies may be more convenient, supervision through the judiciary arguably ensures more accurate implementation of state policy. Courts are especially well-suited to interpret and enforce state legislative policy.⁸⁹

A second perceived difference between agency and judicial review is that much of the substance of administrative adjudication may be outside the area of judicial competence to administer.⁹⁰ For example, a specialized agency is arguably better qualified to assess the technical qualifications that form the basis of a lawsuit in a situation like the medical peer review process involved in recent antitrust cases.⁹¹ Technical review of a plaintiff's factual basis for suit in this case would amount to *de novo* review.⁹² It would be as unlikely in an administrative agency⁹³ as it is in

84. Administrative agencies "furnish protection to rights and obstacles to wrongdoing which under our new social and industrial conditions cannot be *practically* accomplished by the old and simple procedure of legislatures and courts." *Id.* at 7 (quoting Elihu Root) (emphasis added).

85. *See id.*

86. *See infra* notes 88-100 and accompanying text.

87. *See Bolt v. Halifax Hosp. Medical Center*, 851 F.2d 1273, 1282 (11th Cir.), *vacated*, 861 F.2d 1233 (1988) (en banc).

88. *See K.C. Davis, supra* note 83, at 13-14.

89. *See Bolt*, 851 F.2d at 1282.

90. *See K.C. Davis, supra* note 83, at 14.

91. *See, e.g., Patrick v. Burget*, 108 S. Ct. 1658, 1663-64 (1988); *Bolt*, 851 F.2d at 1276-77.

92. A *de novo* standard of review looks at the merits of a case as if it had not been heard before and no decision had been previously rendered. *See* 1 S. Childress & M. Davis, *Standards of Review: Federal Civil Cases and Review Process* § 2.14, at 76 (1986) ("de novo" review is defined as the "appellate power, ability, and competency to come to a different conclusion on the record as determined below"). In this Note, "de novo" review is used interchangeably with "review on the merits." *See infra* notes 121-25 and accompanying text.

93. In the privilege termination context, it is unclear whether an administrative agency would review the merits of such a decision. *See Amici Curiae Brief for American Medical Association* at 15, *Patrick v. Burget*, 108 S. Ct. 1658 (1988) (No. 86-1145) (to

the courts.⁹⁴ A requirement of *de novo* review of private conduct would force courts to act outside the area of judicial competence. It would impose too great a burden on the states,⁹⁵ and it would transform the evidentiary *Midcal* second prong into a vehicle for invalidating a state-chosen system of regulation.

A third perceived difference is that judicial review is awkward, slow and expensive.⁹⁶ The common assumption is that agency review, unlike traditional judicial review, is automatic—that agencies are statutorily obligated to review every decision, regardless whether the aggrieved party has lodged a complaint.⁹⁷ From this perspective agency review appears more direct than the cumbersome and expensive process a wronged individual must pursue in the state court system.⁹⁸

Judicial review, however, may be equally automatic: a state statute may expressly provide for judicial review.⁹⁹ In addition, where state law creates a cause of action for a specific wrong, judicial review is constructively automatic; for an aggrieved party who pursues his remedy, it is as effective as automatic review.

Judicial review also entails efficiency justifications. If the state pro-

require as a condition of immunity that each peer review decision be reviewed on the merits by an agent of the state would make state compliance impossible).

94. See, e.g., *Mendez v. Belton*, 739 F.2d 15, 20 (1st Cir. 1984) (affirming grant of summary judgment since plaintiff "failed to establish the existence of a genuine factual controversy"); *Sosa v. Board of Managers of Val Verde Memorial Hosp.*, 437 F.2d 173, 177 (5th Cir. 1971) ("[S]o long as staff selections are administered with fairness, geared by a rationale compatible with hospital responsibility, and unencumbered with irrelevant considerations, a court should not interfere."); *Williams v. Kleaveland*, 1983-2 Trade Cas. (CCH) ¶ 65,486, at 68,357, 68,368 (W.D. Mich. 1983) (purpose of this litigation is not to provide a *de novo* medical review, but rather to ensure that the process was bona fide, and that the decisions were premised on valid medical concerns); *Peterson v. Tucson Gen. Hosp.*, 114 Ariz. 66, 72, 559 P.2d 186, 192 (1976) (applying *Sosa* standard); *Garrow v. Elizabeth Gen. Hosp. & Dispensary*, 79 N.J. 549, 565, 401 A.2d 533, 541 (1979) (standard of review is merely to ascertain if there was sufficient reliable evidence in the record to justify the result); *Zoneraich v. Overlook Hosp.*, 212 N.J. Super. 83, 91-92, 514 A.2d 53, 57-58 (App. Div. 1986) (same).

95. See *Amici Curiae Brief for American Medical Association* at 15-16, *Patrick v. Burget*, 108 S. Ct. 1658 (1988) (No. 86-1145) (literally millions of peer review decisions are made each year; even if the states wished to review all the decisions, they could not); *supra* note 93.

96. See K.C. Davis, *supra* note 83, at 14.

97. See, e.g., *Bolt v. Halifax Hosp. Medical Center*, 851 F.2d 1273, 1282 (11th Cir.), *vacated*, 861 F.2d 1233 (1988) (en banc).

98. See Casenote, *supra* note 21, at 948.

99. In *Patrick*, the Court suggests, without elaborating, that such statutes exist. See *Patrick v. Burget*, 108 S. Ct. at 1658, 1665 (1988) (unclear whether Oregon law affords any direct judicial review of private peer-review decisions since Oregon has no statute expressly providing for judicial review of privilege terminations). In *Bolt*, the Court made an even more oblique reference to the existence of such statutes. See *Bolt*, 851 F.2d at 1282 (judicial review provided without express legislative authorization does not make that review any less a form of regulation by the state).

For analogous statutes that to some extent provide for judicial review, see W. Keeton, *Prosser and Keeton on Torts* 229-34 (5th ed. 1984) (violation of certain state or federal statutes may subject defendant to liability on a negligence per se tort basis).

vides a cause of action, plaintiffs may bring their claim to the attention of the court. This obviates the need for an infrastructure of agencies that must review each and every anticompetitive action of a private party.¹⁰⁰

C. Judicial Review as Active Supervision

1. The Requirement of "Active" Supervision

The *Midcal* test requires "active" supervision.¹⁰¹ In light of recent cases,¹⁰² the "active" requirement appears to be simply another reference to the "ultimate power" criterion.¹⁰³ The Supreme Court has not yet decided whether judicial review is sufficiently "active" to satisfy the *Midcal* supervision requirement.¹⁰⁴

Commentary suggests that judicial review is merely passive state supervision, if it qualifies as supervision at all.¹⁰⁵ Accepting judicial review as "active" supervision arguably provides a meaningless standard because, in a broad sense, all persons are subject to judicial supervision.¹⁰⁶ This argument, however, fails to consider that judicial review is only available where state law has been violated. Only in such a situation does an aggrieved individual have an enforceable claim through which to seek a remedy. Yet, in this situation judicial supervision is as "active" as is necessary.¹⁰⁷

While the Supreme Court has not elaborated on the "active" nature of state supervision,¹⁰⁸ lower courts have shown a tendency to settle for

100. See *supra* notes 60-62 and accompanying text.

101. See, e.g., *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 62 (1985); *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 40 (1985); *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980) (the State must actively supervise any private anticompetitive conduct).

102. See, e.g., *Patrick v. Burget*, 108 S. Ct. 1658 (1988); *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48 (1985); see also *infra* note 108.

103. See *supra* notes 77-79 and accompanying text.

104. See *Patrick v. Burget*, 108 S. Ct. 1658 (1988).

105. See Casenote, *supra* note 21, at 948 (criticizing the decision in *Patrick v. Burget*, 800 F.2d 1498 (9th Cir. 1986), *reversed*, 108 S. Ct. 1658 (1988)).

106. See *id.* at 948-50. Nevertheless, allowing judicial review to serve as active supervision does reinforce two public policies: the state policy of self-regulation and the avoidance of frivolous claims. See *id.*

107. For example, the trial court in *Patrick v. Burget* awarded plaintiff substantial damages on a state common law claim. Plaintiff had an enforceable claim only because the defendant's conduct did not accord with state policy. See *Patrick v. Burget*, 800 F.2d 1498, 1505 (9th Cir. 1986), *reversed*, 108 S. Ct. 1658 (1988); see also cases cited *infra* note 124.

108. In *Patrick*, for example, the "active" element of the supervision requirement is not specifically addressed. See *Patrick*, 108 S. Ct. at 1664. In this case respondents attempted to show that the State of Oregon supervised the peer review process through two state agencies and through the state judicial system. The Court determined that the two state agencies had no *authority* or *power* to disapprove private privilege decisions. See *id.* at 1664 (emphasis added). Discussing judicial review, the Court merely noted that the case did not require it to decide whether state courts, acting in their judicial capacity,

"effective"¹⁰⁹ or "adequate"¹¹⁰ supervision, or "some lower level of supervision,"¹¹¹ when the defendant is a private party delegate of state authority. "Effective" is perhaps a more appropriate adjective for the *Midcal* supervision concept.¹¹² "Effective" supervision would be more consistent with the Court's essential requirement that a state official have and exercise ultimate authority over private anticompetitive conduct.¹¹³ In addition, it would entail the same efficiency justifications noted in the previous section.¹¹⁴

Thus, while state court judicial review would likely satisfy an "effec-

could "adequately supervise private conduct for purposes of the state action doctrine." *Id.* (emphasis added).

The Court explained that the supervision element mandates that the state exercise ultimate control over the challenged anticompetitive conduct. *See id.* at 1663; *supra* notes 77-79 and accompanying text. In other words, the active supervision prong merely requires that state officials "have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy." *Id.* at 1663; *see infra* note 113 and accompanying text.

Likewise, in *Midcal* the lack of any "active" element of the supervision requirement was not addressed. *See California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105-06 (1980). In this case the Court found no antitrust immunity for California's wine-pricing system. Even though the Court found a clear legislative policy to permit resale price maintenance, there was no state supervision of the anticompetitive activity. *See id.* at 105.

The Court noted that the state simply authorized price setting and enforced the prices established by private parties. *See id.* It neither established prices nor reviewed the reasonableness of the price schedules, nor did it monitor market conditions or engage in any pointed reexamination of the program. *See id.* at 105-06. The Court cited an earlier California case that struck down parallel restrictions on the sale of liquor because the state had played only a "passive" role in liquor pricing. *See id.* at 100 (citing *Rice v. Alcoholic Beverage Control Appeals Bd.*, 21 Cal. 3d 431, 445, 579 P.2d 476, 486, 146 Cal. Rptr. 585, 595 (1978)). However, in formulating its holding, the *Midcal* Court declined to use the active/passive language found in *Rice* to draw a distinction. *See id.* at 105.

109. *See Bolt v. Halifax Hosp. Medical Center*, 851 F.2d 1273, 1282 (11th Cir.), *vacated*, 861 F.2d 1233 (1988) (en banc). In holding that judicial review satisfies the active supervision requirement, the *Bolt* court did not explain how judicial review is sufficiently "active." The court came closest to reaching such a conclusion when it stated that the fact "that judicial review is not automatic in the sense that it must be triggered by the affirmative act of an aggrieved party does not make the state's supervision any less *effective*." *Id.* (emphasis added).

110. *See Patrick v. Burget*, 800 F.2d 1498, 1506 (9th Cir. 1986), *reversed*, 108 S. Ct. 1658 (1988).

111. *See Fuchs v. Rural Elec. Convenience Coop.*, 1988-2 Trade Cas. (CCH) ¶ 68,247, at 59,542 (7th Cir. 1988) (holding that since defendant—an unregulated, not-for-profit electric cooperative—was not a "purely private actor," it could be found immune without the "active scrutiny" necessary for purely private entities).

112. For the analysis used in recent Supreme Court state action immunity cases, *see supra* note 108.

113. *See Patrick v. Burget*, 108 S. Ct. 1658, 1664 (1988). The requirement that state officials have *and exercise* ultimate authority does not mean that such officials must exercise that authority in every instance. *See supra* notes 79-81 and accompanying text.

114. *See supra* note 100 and accompanying text.

tive" supervision requirement,¹¹⁵ it would also appear to satisfy an "active" requirement that simply reiterates the ultimate power criterion for *Midcal* supervision.

2. The "State Action" Requirement

The second *Midcal* prong requires active supervision by "the State itself."¹¹⁶ Establishing a system of regulatory oversight demonstrates a state's commitment to a program of regulation¹¹⁷ and, as the courts have noted, there is no inherent reason why it must be a state agency rather than a state court that provides such oversight.¹¹⁸ The action of state courts is clearly regarded as state action in other contexts, such as fourteenth amendment equal protection¹¹⁹ and procedural due process analyses.¹²⁰ Thus, action of the state courts should suffice as state action for purposes of the *Midcal* requirement.

3. The Standard of Review

Given this background of the *Midcal* test, a further problem can be resolved: What standard of review should be required to satisfy the second *Midcal* requirement? Dictum in *Patrick v. Burget* suggests that a state court would need to review a privilege termination decision "on the merits" before such judicial review could satisfy the *Parker* doctrine's requirement of active supervision.¹²¹

A more lenient standard of review would perhaps be as effective as review on the merits. Review of the fairness of the procedures¹²² used in a privilege termination case may similarly entail the power to disapprove those anticompetitive acts of private parties that fail to accord with state policy.¹²³ State courts normally review privilege termination decisions

115. See *Bolt v. Halifax Hosp. Medical Center*, 851 F.2d 1273, 1282 (11th Cir.), *vacated*, 861 F.2d 1233 (1988) (en banc).

116. *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980) (citing *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978)).

117. See *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 61 n.23 (1985) (citing 1 P. Areeda & D. Turner, *Antitrust Law* ¶ 213a, at 73 (1978)).

118. See *Bolt v. Halifax Hosp. Medical Center*, 851 F.2d 1273, 1282 (11th Cir.), *vacated*, 861 F.2d 1233 (1988) (en banc); cf. *Patrick v. Burget*, 108 S. Ct. 1658, 1664-65 (1988).

119. See, e.g., *Shelley v. Kraemer*, 334 U.S. 1, 14 (1948).

120. Cf. *Blum v. Yaretsky*, 457 U.S. 991 (1982) (a state normally can be held responsible for a decision where it has exercised coercive power); *Spencer v. Lee*, No. 87-1203, slip op. at 5 (7th Cir. Jan. 3, 1989) (LEXIS, Genfed library, U.S. App. file) (dictum) ("Who does the state's business is the state's actor.").

121. See *Patrick v. Burget*, 108 S. Ct. 1658, 1665 (1988).

122. See *Bolt v. Halifax Hosp. Medical Center*, 851 F.2d 1273, 1282 (11th Cir.), *vacated*, 861 F.2d 1233 (1988) (en banc) (review of the fairness of the procedures used, including "consideration of whether the criteria used by decisionmakers were consistent with state policy and whether the decision had a sufficient basis in fact") [hereinafter the "procedural standard of review"].

123. See cases cited *infra* note 124. The Supreme Court seems to distinguish agency

using a variant of the procedural review standard;¹²⁴ review on the merits would be unusual. A requirement of review on the merits would effectively eliminate judicial review from the states' supervisory arsenal as far as *Parker* immunity is concerned.¹²⁵

4. Proposing a Change in the Burden of Proof

If judicial review satisfies the *Midcal* supervision requirement, an important issue before the courts will be whether actual review is necessary or whether the availability of court review will suffice. The Supreme Court has already characterized the supervision requirement as "evidentiary;"¹²⁶ it would not be inconsistent to resolve the issue using an evidentiary test. The availability of judicial review could create a presumption of active supervision by the state. The presumption would

review from judicial review and to impose two different standards: i) "Ultimate authority" (apparently no more than the power to disapprove private privilege decisions on procedural grounds) for agency review, see *Patrick v. Burget*, 108 S. Ct. at 1664, and ii) Review on the merits for judicial review. See *id.* at 1665.

124. See, e.g., *Applebaum v. Board of Directors of Barton Memorial Hosp.*, 104 Cal. App. 3d 648, 656, 163 Cal. Rptr. 831, 836 (1980) (common law right to fair procedure protects individuals from arbitrary exclusion or expulsion); *North Broward Hosp. Dist. v. Mizell*, 148 So. 2d 1, 5 (Fla. 1962) (review of the sufficiency of the evidence relied upon by the decisionmakers); *Hackett v. Metropolitan Gen. Hosp.*, 422 So. 2d 986, 988-89 (Fla. Dist. Ct. App. 1982) (if a doctor cannot obtain judicial relief for violation of a statute, its provisions are rendered meaningless; plaintiff's complaint as a whole sufficiently alleges the denial of staff privileges); *Dance v. North Broward Hosp. Dist.*, 420 So. 2d 315, 315 (Fla. Dist. Ct. App. 1982) (review of privilege termination decisions to ascertain whether they were reached by way of fair procedures); *Jain v. Northwest Community Hosp.*, 67 Ill. App. 3d 420, 424-25, 385 N.E.2d 108, 112 (1978) (applied procedural review standard, noting parallel common law rule that voluntary associations which affect important economic interests must conduct expulsion proceedings according to their bylaws); *Guerrero v. Burlington County Memorial Hosp.*, 70 N.J. 344, 360 A.2d 334 (1976):

[Balancing the needs of the aggrieved party and the hospital, there are times when] the wisdom of [a peer review] determination may be challenged. On such occasions a reviewing court should confine its effort to determining whether the decision made by the hospital is supported by substantial credible evidence and is neither arbitrary nor capricious.

Id. at 355-56, 360 A.2d at 340; *Greisman v. Newcomb Hosp.*, 40 N.J. 389, 404, 192 A.D.2d 817, 825 (1963) ("While reasonable . . . exercises of judgment should be honored, courts would indeed be remiss if they declined to intervene [on privilege termination decisions] for a reason unrelated to sound hospital standards and not in furtherance of the common good."); *Wright v. Bateson*, 5 Or. App. 628, 631, 485 P.2d 641, 644 (1971), *cert. denied*, 405 U.S. 930 (1972) ("Judicial review of administrative action is limited to whether or not there is substantial evidence to support the findings: The court does not try the case de novo."); see also cases cited *supra* note 94.

125. A requirement of review on the merits would give states an all-or-nothing choice, either to install a full regulatory apparatus, or to withdraw in favor of competition. The first option is likely to result in costly regulation. See Easterbrook, *supra* note 20, at 33; see also *supra* note 60 and accompanying text.

A state should be able to choose to regulate private economic activity through its courts or through a state agency. See *Bolt v. Halifax Hosp. Medical Center*, 851 F.2d 1273, 1282 (11th Cir.), *vacated*, 861 F.2d 1233 (1988) (en banc).

126. See *supra* note 47 and accompanying text.

be rebutted by evidence that a state actually does not review the anticompetitive decisions of private parties. This evidentiary system would satisfy the major concern underlying the *Midcal* supervision requirement—that state officials have and exercise ultimate power to review and disapprove those anticompetitive acts that violate state policy.¹²⁷

CONCLUSION

Judicial review should satisfy the *Midcal* active supervision requirement to immunize a private party from antitrust liability. This conclusion accords with the policy of deference to state economic choices in the absence of clear congressional intent to the contrary. It also permits the states a broader range of regulatory alternatives that is likely to result in increased efficiency.

Applying a stricter *Midcal* test, and thereby preventing judicial review from possibly satisfying the active supervision requirement, risks transforming the procedural state action immunity test into a substantive evaluation of state economic wisdom. The better approach would allow state court review as active supervision to immunize private parties from antitrust liability.

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127. See *Patrick v. Burget*, 108 S. Ct. at 1658, 1664 (1988).

In addition, this approach would reconcile the split of opinion between *Patrick* and the vacated *Bolt* decision. In the former case, evidence of no actual state court review of a hospital's peer review decisions would have rebutted the presumption of active supervision. See *Patrick*, 108 S. Ct. at 1665. In the latter case, the presumption would stand; the only evidence of actual review showed that state courts did indeed review peer review decisions, albeit using the procedural review standard. See *Bolt*, 851 F.2d at 1282.

